(3)

No. 04-947

Supreme Court, U.S.
FILED
MAR 31 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

COLUMBIA RIVER
CORRECTIONAL INSTITUTE, et al.,

Petitioners,

v.

BILLY RAY PHIFFER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

ROGER HENNAGIN
Counsel of Record
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, OR 97034
(503) 636-0400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity.

2. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, validly abrogates state sovereign immunity.

3. Whether states that receive federal funds validly waive their sovereign immunity against suits under Section 504 of the Rehabilitation Act that challenge disability-based discrimination in programs or activities that receive federal financial assistance.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
REASONS FOR DENYING THE WRIT	4
I. THE ADA TITLE II ABROGATION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW HERE	6
A. Revisiting the question presented in *Lane* would be premature	6
B. This is not a proper case in which to address the section 5 basis for Title II	8
C. The decision of the court of appeals was correct	11
II. THE QUESTION WHETHER SECTION 504 OF THE REHABILITATION ACT EXACTS A VALID WAIVER OF STATE SOVEREIGN IMMUNITY DOES NOT WARRANT THIS COURT'S REVIEW	15
A. This case does not implicate any conflict in the circuits concerning Section 504's waiver of sovereign immunity	15
B. The validity of Section 504's waiver of sovereign immunity does not warrant this court's review in any event	18
III. THE QUESTION WHETHER SECTION 504 VALIDLY ABROGATES STATE SOVEREIGN IMMUNITY IS PURELY ACADEMIC	22
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

A.W. v. Jersey City Pub. Schs., 341 F.3d 234 (3d Cir. 2003) 17

Arkansas Dep't of Educ. v. Jim C., 533 U.S. 949 (2001) 19

Badillo-Santiago v. Naveira-Merly, 378 F.3d 1 (1st Cir. 2004) 7

Barbour v. Washington Metro. Transit Auth., 374 F.3d 1161 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. ___ (Mar. 7, 2005) 16, 17

Barnes v. Gorman, 536 U.S. 181 (2002) 9

Beckford v. Irvin, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) 14

Board of Trustees v. Garrett, 531 U.S. 356 (2001) 3, 14

Browdy v. Karpe, 2004 WL 2203464 at *8 (D. Conn., Sept. 20, 2004) 8

Buchanan ex rel. Estate of Buchanan v. Maine, 2004 WL 2457796 at *2-*3 (D. Me., Nov. 2, 2004) 8

Casey v. Lewis, 834 F. Supp. 1569 (D. Ariz. 1993) 14

Chandler v. Lovell, 537 U.S. 1105 (2003) 19

City of Boerne v. Flores, 521 U.S. 507 (1997) 12, 16, 22

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 12

Clark v. California, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 3, 16

Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) 14

TABLE OF AUTHORITIES – Continued

Page

Cochran v. Pinchak, 2005 WL 589434 (3d Cir. Mar. 15, 2005) 7

College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board, 527 U.S. 666 (1999) 16, 19

Colorado v. Spring, 479 U.S. 564 (1987) 21

Cruz v. Beto, 405 U.S. 319 (1972) 13

Dare v. California, 191 F.3d 1167 (9th Cir. 1999), *cert. denied*, 531 U.S. 1990 (2001) 3

Deshaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) 13

Doe v. Nebraska, 345 F.3d 593 (8th Cir. 2003) 17

Estelle v. Gamble, 429 U.S. 97 (1976) 13

Farmer v. Brennan, 511 U.S. 825 (1994) 13

Feaster v. Florida Dep't of Health, 124 S. Ct. 2387 (2004) 8

Flakes v. Frank, 322 F. Supp. 2d 981 (W.D. Wis. 2004) 8

Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98 (2d Cir. 2001) 16, 17, 18, 20

Garrett v. University of Alabama at Birmingham Bd. of Trs., 344 F.3d 1288 (11th Cir. 2003) 16, 17

Goodman v. Ray, No. 02-10168 (11th Cir. Sept. 16, 2004) 11

Hawaii v. Vinson, 537 U.S. 1104 (2003) 19

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied*, 533 U.S. 949 (2001) 16, 20

TABLE OF AUTHORITIES – Continued

Page

Johnson v. California, 125 S. Ct. 1141 (2004) 12

Kansas v. Robinson, 539 U.S. 926 (2003) 19

Kiman v. New Hampshire Dep't of Corrs., 124 S. Ct. 2387 (2004) 8

Koslow v. Pennsylvania, 302 F.3d 161 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003) 16

Lapides v. Board of Regents, 535 U.S. 613 (2002) 21, 22

Lewis v. Casey, 518 U.S. 343 (1998) 13

McNulty v. Bd. of Educ., 2004 WL 1554401 at *3 (D. Md., July 8, 2004) 8

Miller v. King, 384 F.3d 1248 (11th Cir. 2004) 7, 11

Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 10

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 12

Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003) 16, 17

Nihiser v. Ohio E.P.A., 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002) 16, 19

Pace v. Bogalusa City Sch. Bd., 325 F.3d 609 (5th Cir. 2003) 16, 17

Parr v. Middle Tenn. St. Univ., 124 S. Ct. 2386 (2004) 8

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 19

Pennsylvania Dep't of Corr. v. Koslow, 537 U.S. 1232 (2003) 19

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 18

Ramirez-Zayas v. Puerto Rico, 225 F.R.D. 396 (D. P.R. 2005) 8

Rendon v. Florida Dep't of Highway Safety & Motor Vehicles, 124 S. Ct. 2387 (2004) 8

Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003) 16

Sandin v. Conner, 515 U.S. 472 (1995) 14

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 16, 17, 18

Simmang v. Texas Bd. of Law Examiners, 346 F. Supp. 2d 874 (W.D. Tex. 2004) 8

South Dakota v. Dole, 483 U.S. 203 (1987) 16, 19

Spencer v. Early, 125 S. Ct. 657 (2004) 8

Spencer v. Easter, 124 S. Ct. 2386 (2004) 8

Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000) 16

Tennessee v. Lane, 124 S. Ct. 1978 (2004) ..... *passim*

Vitek v. Jones, 445 U.S. 480 (1980) 14

Washington Metro. Area Transit Auth. v. Barbour, 125 S. Ct. ___ (March 7, 2005) 19

Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993) 14

Zukle v. Regents of the University of California, 166 F.3d 1041 (9th Cir. 1999) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

29 U.S.C. § 794 ..... 2, 9

29 U.S.C. § 794(a) 15

42 U.S.C. § 12132 ..... 2, 9

42 U.S.C. § 12133 9

42 U.S.C. § 12134(b) 9

42 U.S.C. § 2000d-7(a)(1) ..... *passim*

STATEMENT OF FACTS

1. Respondent Billy Ray Phiffer is a former inmate of the Oregon prison system. Pet. App. 8. He has osteoarthritis and osteoporosis. *Id.* In this case, Phiffer seeks relief for the state's failure to accommodate those disabilities during his incarceration. *Id.*

Beginning in March 1998, while Phiffer was incarcerated at the Columbia River Correctional Institute, the state required him to attend the Pathfinders Program. *Id.* Pathfinders is an "experiential learning" program that provides training in skills that will aid in community reentry following a prisoner's release from confinement. Oregon DOC Operations Division, *Programs*, available at http://www.oregon.gov/DOC/OPS/PRISON/scimccf_programs.shtml. The following month, the state transferred Phiffer to the Santiam Correctional Institute, but the state continued to require him to attend the Pathfinders Program until it returned him to Columbia River in December 1998. Pet. App. 8.

Participants in the Pathfinders Program are required to sit for a three-hour period five days per week. *Id.* Because of his disabilities, such extensive periods of sitting are extremely painful for Phiffer. See *id.* Phiffer asked the state to accommodate his disability within Pathfinders (through such means as providing him a padded chair in which to sit) or, in the alternative, to transfer him to the Transitional Mental Health Program, in which he had previously participated without experiencing undue pain. *Id.*[1] But the

[1] As the district court noted, "[b]oth the Transitional Mental Health Program and the Pathfinders Program are funded by the federal government." Pet. App. 8.

state denied these requests. *Id.* "As a result, Plaintiff suffered severe physical pain while he was enrolled in the Pathfinders Program." *Id.*

2. Phiffer filed this lawsuit in 2000 in the United States District Court for the District of Oregon. He contended that the state's failure to accommodate his disabilities violated Title II of the Americans with Disabilities Act (42 U.S.C. § 12132), which prohibits disability-based discrimination by state entities, and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), which prohibits disability-based discrimination by recipients of federal financial assistance. Pet. App. 7. He also contended that the state's conduct violated Oregon law. *Id.* Phiffer sought money damages from the state on each of these claims.

The state moved for judgment on the pleadings on the ADA and Section 504 claims. *Id.* It contended that sovereign immunity barred Phiffer's damages claims under these statutes. *Id.* at 9. The district court denied that motion. *Id.* at 6-18. The court noted that Congress expressly declared that states are not entitled to sovereign immunity against suits brought under the ADA and Section 504. *Id.* at 11-12, 17; see 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . ."); *id.* § 12202 (ADA) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). The court concluded that these statutes represented a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and thus could validly abrogate state sovereign immunity. Pet. App.

13-17. The court further concluded that when Oregon accepted federal funds for the Transitional Mental Health Program and the Pathfinders Program it voluntarily "waived any immunity available to [it] under the Eleventh Amendment." *Id.* at 17.

The state took an interlocutory appeal, and the court of appeals affirmed in an unpublished memorandum. *Id.* at 19-21. The court first held that Title II of the ADA validly abrogated the state's sovereign immunity. *Id.* at 20-21. In so holding, the court of appeals relied on its own earlier precedents that had concluded that Title II was proper Section 5 legislation. See *id.* at 20 (citing *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1990 (2001); *Clark v. California*, 123 F.3d 1267, 1270 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)). The state contended that those precedents were inconsistent with *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), in which this court held that Title I of the ADA – which prohibits disability-based discrimination in employment – was not proper Section 5 legislation. Pet. App. 20. But the court of appeals responded that it had "already rejected" the contention that *Garrett*'s holding extended to Title II of the ADA – which prohibits disability-based discrimination by public entities outside of the context of employment. Pet. App. 20.

The court of appeals then turned to the Rehabilitation Act claim. The court found its precedent "clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds." Pet. App. 21. As for the state's contention that intervening Supreme Court decisions had undermined that clear precedent, the court found the contention to be "without merit." *Id.*

3. The state sought certiorari in this court. While the state's petition for certiorari was pending, this court decided *Tennessee v. Lane*, 124 S. Ct. 1978 (2004). *Lane* held that ADA Title II is proper legislation to enforce the Fourteenth Amendment, and thus validly abrogates state sovereign immunity, at least insofar as the statute "applies to the class of cases implicating the accessibility of judicial services." *Id.* at 1993. This court then summarily granted the petition for certiorari in this case, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Lane*. Pet. App. 22. On remand, the court of appeals "conclude[d] that [its] initial resolution of this case [was] consistent with *Lane*'s holding." *Id.* at 2-3. The court accordingly reinstated its earlier judgment affirming the denial of the motion for judgment on the pleadings, and it reissued its earlier unpublished memorandum "in per curiam form without further amendment." *Id.* at 3. Judge O'Scannlain filed a separate concurrence; although he did not express disagreement with the panel's application of sovereign immunity principles to this case, he argued that the court's pre-*Lane* precedent – on which the panel relied in reaching its decision here – had failed to engage in a sufficiently "nuanced" analysis and thus was of "uncertain" vitality following *Lane*. *Id.* at 5.

REASONS FOR DENYING THE WRIT

Less than one year ago, this court held that Title II of the Americans with Disabilities Act was proper legislation to enforce the Fourteenth Amendment, and thus could abrogate state sovereign immunity, at least insofar as the statute "applies to the class of cases implicating the

accessibility of judicial services." *Tennessee v. Lane*, 124 S. Ct. 1978, 1993 (2004). In so ruling, the court noted that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 1989. The court further observed that "[t]his pattern of disability discrimination persisted despite several federal and state legislative efforts to address it." *Id.* at 1990. But rather than resolve the constitutionality of Title II in "its wide variety of applications, as an undifferentiated whole," *id.* at 1992, the court upheld that abrogation in the application before it and left for another day the question whether the statute may constitutionally be applied more broadly, see *id.* at 1992-1993.

Lane thus left it to the lower courts in the first instance to address the constitutionality of Title II's abrogation outside of the access-to-courts context. To date, only two courts of appeals – including the panel in the case under review – have weighed in on this question. Based on that limited experience, the state contends that *Lane* has changed nothing and that this court should grant certiorari again, scarcely a year later, to address the issue on which the court granted certiorari in *Lane*.

Such a step would obviously be premature. But even if the issue of Title II's validity under Section 5 of the Fourteenth Amendment warranted review at this time, this would not be an appropriate case in which to grant certiorari, because the court would likely be unable to reach the Title II issue. In addition to his ADA claim, Phiffer seeks relief under Section 504 of the Rehabilitation Act of 1973, from which both the substantive standards and the remedies afforded under ADA Title II are drawn. Under the

current circuit law in *every* circuit to have addressed the question, Oregon validly waived its sovereign immunity against Section 504 claims by accepting federal financial assistance. See Parts I & II, *infra*.

Because Phiffer's Section 504 claim will afford him all of the relief to which he is entitled under Title II, any ruling on the Title II claim will be effectively advisory. By contrast, *Goodman v. Georgia*, No. 04-1236 (petition for writ of certiorari filed March 9, 2005), and *United States v. Georgia*, No. 04-1203 (petition for writ of certiorari filed March 9, 2005), would offer the court an opportunity to address the Title II abrogation issue in a concrete factual setting in which the issue actually makes a difference to the outcome of the case. If the issue did warrant review, *Goodman* would be the proper case in which to grant certiorari.

I. THE ADA TITLE II ABROGATION ISSUE DOES NOT WARRANT THIS COURT'S REVIEW HERE

A. Revisiting the question presented in *Lane* would be premature

In its petition for certiorari, the state does not focus on any post-*Lane* split in the circuits regarding the Section 5 basis for Title II of the ADA. Instead, the state notes that "[*b*]*efore Lane*, the circuits were deeply divided" over the question, Pet. 10 (emphasis added), and asserts that "*Lane* did little, if anything, to mend the circuit split," Pet. 13. Accordingly, the state contends, the issue of Title II's constitutionality under Section 5 "warrants a grant of certiorari here, just as it did when this court granted certiorari in *Lane*." Pet. 14.

The state's argument might be in order if, in the less than one year since *Lane* was decided, courts of appeals had issued a rash of conflicting rulings on Title II's constitutionality. But, in fact, the state can point to only two court of appeals decisions, in addition to the decision under review, that even address *Lane*. One of those decisions, *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1, 5-6 (1st Cir. 2004), merely held that Title II validly abrogated state sovereign immunity in the access-to-courts context – the same context addressed in *Lane* itself. The state cannot identify any court of appeals to have disagreed with that holding – and, indeed, any court of appeals to do so would risk summary reversal by this court.

The other post-*Lane* court of appeals case cited by the state, *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), held that "Title II of the ADA, as applied in the Eighth-Amendment context to state prisons, fails to meet the requirement of proportionality and congruence." *Id.* at 1275. The scope of the *Miller* court's ruling is uncertain given that the court did not explain what it means to apply a statute "in the Eighth-Amendment context." But in any event, that case hardly warrants the state's conclusion that a circuit split persists and that "there is no reason to believe that the passage of time and further consideration of the decision in *Lane* will do anything to resolve it." Pet. 13.[2] In addition to the present case, this court remanded

[2] After the state filed its petition for certiorari, the Third Circuit issued its opinion in *Cochran v. Pinchak*, 2005 WL 589434 (3d Cir. Mar. 15, 2005), in which a divided panel held that Congress lacked Section 5 authority to extend Title II to prison cases that implicate only the constitutional prohibition on irrational discrimination. That decision, too, does not justify the state's conclusion that *Lane* has had no effect on the pre-existing split in the circuits.

six other ADA Title II abrogation cases to the courts of appeals for further consideration in light of *Lane*,[3] and numerous other Title II abrogation cases are pending at the trial and appellate levels.[4] The ultimate rulings of the courts of appeals in these cases will doubtless clarify whether and on what aspects of Title II's constitutionality this court's intervention is necessary. There is surely no need to rush to the state's conclusion that *Lane* clarified nothing, and that the preexisting circuit split was just as wide and deep the day after the court's decision in that case as the day before.

B. This is not a proper case in which to address the section 5 basis for Title II

Even if the constitutionality of Title II's abrogation did warrant this court's review again so soon after *Lane*, this would not be a proper case in which to grant review. In addition to his ADA claim, Phiffer also sought relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

---

[3] See *Spencer v. Early*, 125 S. Ct. 657 (2004); *Spencer v. Easter*, 124 S. Ct. 2386 (2004); *Parr v. Middle Tenn. St. Univ.*, 124 S. Ct. 2386 (2004); *Kiman v. New Hampshire Dep't of Corrs.*, 124 S. Ct. 2387 (2004); *Rendon v. Florida Dep't of Highway Safety & Motor Vehicles*, 124 S. Ct. 2387 (2004); *Feaster v. Florida Dep't of Health*, 124 S. Ct. 2387 (2004).

[4] The state itself cites four post-*Lane* district court decisions. See Pet. 12-13. For other recent district court cases applying *Lane* to determine the constitutionality of Title II's abrogation of state sovereign immunity, see *Ramirez-Zayas v. Puerto Rico*, 225 F.R.D. 396, 399 (D. P.R. 2005); *Simmang v. Texas Bd. of Law Examiners*, 346 F. Supp.2d 874, 881-883 (W.D. Tex. 2004); *Flakes v. Frank*, 322 F. Supp.2d 981, 982 (W.D. Wis. 2004); *Buchanan ex rel. Estate of Buchanan v. Maine*, 2004 WL 2457796 at *2-*3 (D. Me., Nov. 2, 2004); *Browdy v. Karpe*, 2004 WL 2203464 at *8 n.9 (D. Conn., Sept. 20, 2004); *McNulty v. Bd. of Educ.*, 2004 WL 1554401 at *3 (D. Md., July 8, 2004).

§ 794. The substantive requirements of Section 504 are virtually identical to those of Title II of the ADA.[5] And the remedies for violation of the two statutes are completely identical. Congress specifically directed that the "remedies, procedures, and rights" provided under Section 504 "shall be the remedies, procedures and rights" provided under Title II. 42 U.S.C. § 12133; see *Barnes v. Gorman*, 536 U.S. 181, 184-185, 189 n.3 (2002). Accordingly, Section 504 will provide Phiffer with all of the relief to which he would be entitled under Title II – and, indeed, the judgment of the court of appeals rests independently on each statute. See Pet. App. 3-4.

Whatever questions exist regarding the validity of the abrogation of state sovereign immunity under Title II, there can be no doubt that Congress has the power to authorize damages awards against state programs and activities covered by Section 504. As we explain below, every court of appeals to have addressed the issue has held that states validly waive their sovereign immunity against suits challenging discrimination under Section 504. Although there may be a conflict in the circuits regarding the validity of that waiver in a narrow class of cases, for reasons we also explain below that conflict is not implicated here. See Part II, *infra*. Under the law that

---

[5] *Compare* 29 U.S.C. § 794 (prohibiting disability-based discrimination in programs or activities receiving federal financial assistance), *with* 42 U.S.C. § 12132 (prohibiting disability-based discrimination by any "public entity"); see 42 U.S.C. § 12134(b) (requiring Title II's implementing regulations to "be consistent with" Section 504's earlier implementing regulations); see also *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (citing cases recognizing that "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act").

prevails in every circuit to have addressed the issue, Oregon validly waived its sovereign immunity against Phiffer's Section 504 claim.

For these reasons, the Title II abrogation issue is irrelevant to Phiffer's eventual recovery. Even if Title II did *not* validly abrogate state sovereign immunity, Section 504 would provide Phiffer with exactly the same relief he would have received under Title II. Accordingly, this is not an appropriate case in which to decide the Title II question. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ of certiorari as improvidently granted when the issue on which certiorari had been granted would have no effect on the outcome of the underlying case). Review of the Section 5 basis for Title II's abrogation "can await a day when the issue is posed less abstractly." *Id.*

If this court does believe that the Title II abrogation question demands immediate resolution, the twin petitions in *Goodman v. Georgia* and *United States v. Georgia*, *supra*, offer a far more promising opportunity to address it. Unlike Phiffer, the plaintiff in *Goodman* did not assert a claim under Section 504. Accordingly, the question whether ADA Title II validly abrogates state sovereign immunity is one of crucial importance to the *Goodman* plaintiff in a way that it is not to Phiffer. And *Goodman* arises on a full summary judgment record; to the extent that this court believes that addressing the Section 5 basis for Title II requires engagement with the facts of the particular case before it, the bare pleadings of this case

offer very little with which to work. This point takes on particular significance because a key aspect of the Eleventh Circuit's analysis in *Goodman* was its conclusion that Title II could not validly abrogate state sovereign immunity even in a case in which the state conduct that violated the statute also violated the plaintiff's constitutional rights. See *Goodman v. Ray*, No. 02-10168, slip op. (11th Cir. Sept. 16, 2004); see also *Miller*, 384 F.3d at 1276 n.34 (same). Because Phiffer does not contend that the state's conduct also violated his constitutional rights, a grant of certiorari here would leave the court unable to address that issue.

C. The decision of the court of appeals was correct

There is an additional reason why this court need not rush to grant certiorari in this case: The court of appeals correctly concluded that ADA Title II validly abrogated Oregon's sovereign immunity against Phiffer's suit. As the court of appeals observed, nothing in *Lane* – which *upheld* the Section 5 basis for Title II in the case before it – overturned that court's earlier conclusion that Title II is valid Section 5 legislation. See Pet. App. 3-4. Indeed, by recognizing that Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic denials of fundamental rights," *Lane*, 124 S. Ct. at 1989, and that the problem "persisted despite several federal and state legislative efforts to address it," *id.* at 1990, *Lane* lent further support to that conclusion. As this court held in *Lane*, Title II responds to a "record of constitutional violations" that "include[s] judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the

widespread exclusion of persons with disabilities from the enjoyment of public services." *Id.* at 1992. That record, the court concluded, "far exceeds the record" that the court previously held sufficient to justify the Family and Medical Leave Act as Section 5 legislation. *Id.* (citing *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)).

But the decision of the court of appeals was correct even if Title II is not valid Section 5 legislation in *all* of its applications. This case arises in "the prison context, when the government's power [over an individual] is at its apex." *Johnson v. California*, 125 S. Ct. 1141, 1150 (2004). In that context at least, Title II is plainly a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment; the statute thus satisfies the Section 5 test of *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In the prison context, the state retains its general obligation under the Equal Protection Clause not to engage in arbitrary or irrational discrimination on the basis of disability. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1985). As this court recently held, the right to be free from invidious discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration." *Johnson*, 125 S. Ct. at 1150. Compliance by prisons with the Equal Protection Clause, this court declared, "is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." *Id.*

But more is at stake in the prison context than simply the right to be free from arbitrary discrimination. As in the access-to-courts context addressed in *Lane*, application

of Title II to prisons implicates "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 124 S. Ct. at 1988.[6] In particular, the Constitution imposes on states a series of affirmative obligations with respect to those in their custody. See *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 (1989) (recognizing that states have "affirmative duties of care and protection with respect to," *inter alia*, prisoners). The Eighth Amendment, as incorporated in the Fourteenth Amendment, requires states to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Of particular importance to prisoners with disabilities, state officials violate the Constitution when they act with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

And other provisions of the Constitution impose on states still further affirmative obligations in the prison context. For example, the First Amendment, as incorporated in the Fourteenth, requires states to provide prisoners with "meaningful access to the courts." *Lewis v. Casey*, 518 U.S. 343, 358 (1998) (state must provide prisoners) (internal quotation marks omitted). It also requires states to afford prisoners "reasonable opportunities" to exercise their religion. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). And pursuant to the Fourteenth Amendment's Due Process

[6] For this reason, the state is incorrect to contend that the application of Title II to Phiffer's case does not implicate any fundamental right. *Cf.* Pet. 13 n.3.

Clause, states must provide prisoners with procedural protections before engaging in conduct that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); see *Vitek v. Jones*, 445 U.S. 480, 495-496 (1980) (state must provide procedural protections before transferring prisoner to a mental hospital).

Where prisoners with disabilities are concerned, states have frequently violated these constitutional rights. In *Lane* itself, this court noted that prior judicial decisions "document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system." *Lane*, 124 S. Ct. at 1989. And a long line of lower-court cases provides "confirming judicial documentation," *Board of Trustees v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring), that this "pattern of unequal treatment" has also been a pattern of *unconstitutional* treatment. See *Lane*, 124 S. Ct. at 1989 n.11 (citing cases).[7] Given the affirmative obligations the Constitution imposes on states in their

[7] See also, e.g., *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (denial of wheelchair to inmate with paralysis, resulting in inmate's inability to shower himself or leave his cell, violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 180 (W.D.N.Y. 1999) (Eighth Amendment violation existed where plaintiff "was regularly deprived use of his wheelchair for extended periods of time, plaintiff was unable to shower, and . . . he was not allowed to use a cup in order to try to bathe by taking water out of his cell toilet or drinking fountain"); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995) (denial of interpretive services and assistive devices to deaf inmates during medical treatment violated Eighth Amendment where "communication between the patient and medical personnel [was] essential to the treatment in question"); *Casey v. Lewis*, 834 F. Supp. 1569, 1582 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells violated Eighth Amendment).

treatment of prisoners with disabilities, and the extensive history of state violations of those obligations, the conclusion the court reached in the access-to-courts context applies equally well here: "Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in [state prisons] cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct at 1994 (quoting *City of Boerne*, 521 U.S. at 532). The court of appeals thus was correct to conclude that Title II validly abrogated Oregon's sovereign immunity against Phiffer's claim.

II. THE QUESTION WHETHER SECTION 504 OF THE REHABILITATION ACT EXACTS A VALID WAIVER OF STATE SOVEREIGN IMMUNITY DOES NOT WARRANT THIS COURT'S REVIEW

A. This case does not implicate any conflict in the circuits concerning Section 504's waiver of sovereign immunity

Section 504 of the Rehabilitation Act applies to state agencies only insofar as they conduct "program[s] or activit[ies] receiving federal financial assistance." 29 U.S.C. § 794(a). When a state agrees to accept federal funds, Congress has provided that the state "shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation" of that statute. 42 U.S.C. § 2000d-7(a)(1). Taken together, these provisions declare that a state that accepts federal funds waives its sovereign immunity against Section 504 suits in its federally-financed programs and activities. Contrary to the state's contention that the

circuits are deeply split on the matter, Pet. 19-30, *every* court of appeals to have addressed the question has held that waiver to be valid under the principles articulated in cases such as *South Dakota v. Dole*, 483 U.S. 203, 210-212 (1987), and *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666, 686-687 (1999).[8]

The state points to the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001).[9] But *Garcia* did not contest the basic point that states that accept federal funds validly waive their sovereign immunity against suits under Section 504. Instead, the court there focused on a narrower question. The court concluded that a state accepting funds could not have *knowingly* waived its sovereign immunity under Section 504 before 1996 and 1997, when this court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of*

---

[8] See *Pace v. Bogalusa City Sch. Bd.*, 2005 WL 546507 (5th Cir., Mar. 8, 2005); *Barbour v. Washington Metro. Transit Auth.*, 374 F.3d 1161, 1164-1170 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. ____ (Mar. 7, 2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128-130 (1st Cir. 2003); *Garrett v. University of Alabama at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1293 (11th Cir. 2003) (*per curiam*); *Koslow v. Pennsylvania*, 302 F.3d 161, 170-172 (3d Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003); *Robinson v. Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), *cert. denied*, 539 U.S. 926 (2003); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002); *Jim C. v. United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (*en banc*), *cert. denied*, 533 U.S. 949 (2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Clark*, 123 F.3d at 1271.

[9] The state also points to the panel's opinion in *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 615-616 (5th Cir. 2003), which applied a similar analysis to that of the Second Circuit in *Garcia*. But the Fifth Circuit subsequently took the case *en banc* and (after the state filed its petition for certiorari in this case) rejected the panel's analysis. See *Pace v. Bogalusa City Sch. Bd.*, 2005 WL 546507 (5th Cir. Mar. 8, 2005).

Boerne, *supra*. Before that time, the *Garcia* court argued, states had no reason to doubt the constitutionality of ADA's abrogation of state sovereign immunity and thus no reason to believe they were giving anything up under Section 504 when they accepted federal funds. See *Garcia*, 280 F.3d at 114-115 & n.4. Every court of appeals to have resolved the question following *Garcia* has rejected the Second Circuit's Section 504 waiver analysis. See *Pace*, 2005 WL 546507, slip op. 22 (concluding that "the *Garcia* approach is problematic for a number of reasons" and rejecting it); *Barbour*, 374 F.3d at 1166-1168 (noting that "[n]o other circuit has accepted" the *Garcia* analysis, and "likewise reject[ing] it"); *Nieves-Marquez*, 353 F.3d at 130 ("we reject this reasoning [of *Garcia*], as have three other circuits"); *Doe v. Nebraska*, 345 F.3d 593, 601-604 (8th Cir. 2003) (detailing reasons why the *Garcia* analysis is wrong); *Garrett*, 344 F.3d at 1292-1293 (rejecting *Garcia* analysis); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 244 (3d Cir. 2003) (same).

For reasons we explain below, the conflict in the circuits regarding the *Garcia* waiver analysis does not warrant this court's review. But even if it did, this case would not be an appropriate one in which to grant review, because this case simply does not implicate that conflict. Crucial to the Second Circuit's analysis in *Garcia* was that the state conduct at issue occurred during the period from 1993 to 1995 – before *Seminole Tribe* and *Boerne* suggested that the abrogation of state sovereign immunity under ADA Title II might be unconstitutional. See *Garcia*, 280 F.3d at 114 n.4. The court concluded that in the pre-*Seminole*, pre-*Boerne* period, "even the most studied scholar of constitutional law would have had little reason to doubt the validity of Congress's asserted abrogation of

New York's sovereign immunity as to private damage suits under Title II," *id.*; as a result, the state could not have known that it was actually giving up anything under Section 504 when it accepted federal funds during that period.

But this case involves conduct that occurred beginning in March 1998, nearly two years after *Seminole Tribe* and nearly a year after *Boerne*. See Pet. App. 8. Indeed, on March 4, 1998, the attorneys general of 34 states filed a brief in this court which argued that – at least in the prison setting – Congress lacked power to abrogate state sovereign immunity against ADA Title II claims. See Brief for Nevada *et al.* as *amici curiae*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998). By the terms of *Garcia*'s own analysis, the state clearly had at least "a colorable basis . . . to suspect" that Title II's abrogation might be invalid. *Garcia*, 280 F.3d at 114 n.4. The state thus could not have been "ignorant of the fact that it was waiving its possible claim to sovereign immunity" under Section 504 by accepting federal funds. *Id.* Even under *Garcia*, then, Oregon's waiver of sovereign immunity was valid in this case. As a result, this case does not fairly present the question over which the circuits may be in conflict.

B. The validity of Section 504's waiver of sovereign immunity does not warrant this court's review in any event

Even if this case did raise the issue that has divided the circuits, the question of the validity of Section 504's waiver of state sovereign immunity would not warrant this court's review. The court has repeatedly denied petitions for certiorari raising that question – including at

least once this Term. See *Washington Metro. Area Transit Auth. v. Barbour*, 125 S. Ct. ____ (March 7, 2005) (No. 04-748); *Pennsylvania Dep't of Corr. v. Koslow*, 537 U.S. 1232 (2003) (No. 02-801); *Hawaii v. Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Chandler v. Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Ohio EPA v. Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Kansas v. Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) (No. 00-1488). The same course is appropriate here.

1. *The Waiver Decision of the Court of Appeals Was Correct* – The court of appeals was correct to hold that Oregon validly waived its sovereign immunity against Phiffer's Section 504 suit by accepting federal funds for the Pathfinders and Transitional Mental Health Programs. As noted above, every circuit to have addressed the question has concluded that Section 504's waiver satisfies both the requirements for conditional-spending legislation set forth in such cases as *South Dakota v. Dole*, *supra*, and the requirements for waivers of sovereign immunity set forth in such cases as *College Savings Bank*, *supra*. Contrary to the state's suggestion, Pet. 22-23, this Court recognized in *College Savings Bank*, 527 U.S. at 678-679 n.2, 686-687, that Congress may use its conditional-spending power to extract a waiver of a state's sovereign immunity. Section 504's waiver is directly related to the federal interest in assuring that federal funds do not subsidize or facilitate discrimination. *Cf. South Dakota v. Dole*, 483 U.S. at 207 ("conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs") (internal quotation marks omitted). And the waiver is voluntary: A state may retain its sovereign immunity for a given

"program or activity" simply by foregoing federal funding for it; such a choice may be "politically painful," but it is not coercive. *Jim C.*, 235 F.3d at 1082.

The Second Circuit agreed in *Garcia* that Section 504's abrogation provision, 42 U.S.C. § 2000d-7(a)(1), "constitutes a clear expression of Congress' intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Garcia*, 280 F.3d at 113. But it held that even such a clear expression was insufficient to effect a waiver. The crucial question, to the *Garcia* court, was "whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful." *Id.* at 115 n.5. Unless the state knew it had immunity to give away, the court concluded, it could not have intentionally relinquished a known right and thus could not have waived its sovereign immunity. See *id.* at 114.

That conclusion – which has been rejected by every other circuit to confront it – misapprehends this court's precedents in both the conditional-spending and sovereign immunity areas. This court has made clear that the requirement that states "know" the conditions attached to federal funds is an objective one, which merely demands "that Congress speak with a clear voice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). And this court has recently emphasized that the identification of a waiver of sovereign immunity cannot turn on subjective motivations: "Motives are difficult to evaluate, while jurisdictional rules should be

clear." *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002); see also *id.* at 620 ("The relevant 'clarity' here must focus on the litigation act the State takes that creates the waiver. And that act – removal – is clear.").

Garcia's conclusion is also inconsistent with this court's precedents governing waiver of other constitutional rights. This court has repeatedly held that an individual can effect a "knowing" waiver of a constitutional right even if he or she does not understand all of the practical consequences of his or her decision. All that matters is that the individual understand the direct legal consequences of giving up the right. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege."). Section 504's waiver provision plainly satisfies that standard, for it makes absolutely clear that acceptance of federal funds entails a waiver of Eleventh Amendment immunity against suits brought under the statute. See 42 U.S.C. § 2000d-7(a)(1). The fact that some state officials might have erroneously believed that waiving the state's immunity against Section 504 claims had no *practical* consequence did not deprive the state of knowledge of the clear and direct *legal* consequence that immunity against Section 504 claims was, in fact, waived.

2. *The Waiver Question Raises No Issue of Continuing Significance* – In any event, the conflict in the circuits created by *Garcia* is of rapidly diminishing significance and may no longer be a live conflict at all. *Garcia* was decided before this court's decision in *Lapides*, *supra*, which fatally undercut the Second Circuit's emphasis on the subjective knowledge and understanding of the states.

Since *Lapides*, every circuit to have resolved the question has rejected the *Garcia* analysis. See Part II-A, *supra*.

And *Garcia*'s rule applies only to cases that involve conduct that occurred during a very narrow time period. Under the *Garcia* rule, the acceptance of federal funds *prior* to the 1992 effective date of the ADA effected a valid waiver of a state's sovereign immunity against Section 504 claims; and at least by the time of this court's 1997 decision in *City of Boerne*, *supra*, the acceptance of federal funds again effected a valid waiver of a state's sovereign immunity against Section 504 claims. See Part II-A, *supra*. The *Garcia* rule thus applies only with respect to Section 504 claims that arose during the five-year period beginning in 1992 and ending in 1997. That is surely a small – and increasingly smaller – class of cases. Even if this case did implicate the disagreement in the circuits occasioned by *Garcia*, there would be no reason for this court to intervene.

III. THE QUESTION WHETHER SECTION 504 VALIDLY ABROGATES STATE SOVEREIGN IMMUNITY IS PURELY ACADEMIC

The state also asks this court to resolve a purported conflict over whether Congress validly *abrogated* state sovereign immunity against claims brought under Section 504. Pet. 14-19. But that question is purely academic. Because it is clear that states that receive federal funding *waive* their sovereign immunity against Section 504 claims involving federally funded programs or activities, see Part II, *supra*, there is no need for a separate analysis into whether the statute validly *abrogates* sovereign immunity as well. Even if Congress lacked the power to abrogate state sovereign immunity against claims brought

under Section 504, the state's waiver of its immunity renders that conclusion irrelevant. This court's review of the abrogation question is therefore unwarranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROGER HENNAGIN
Counsel of Record
Lakeside Plaza, Suite 300
8 North State Street
Lake Oswego, OR 97034
(503) 636-0400